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No. 79-1195

In the Supreme Court of the United States

OCTOBER TERM, 1979

JAMES E. PENROD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner challenges his conviction for filing false tax returns, alleging that the trial court improperly directed a partial guilty verdict and that his Fourth Amendment rights were violated by the use of evidence which had been obtained from him by a grand jury subpoena duces tecum. There is no merit to either of these claims.

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on two counts of filing false tax returns for the years 1973 and 1974, in violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C. 7206(1)). Petitioner was given concurrent six-month sentences on the two counts. The court of appeals affirmed (Pet. App. 1a-10a).

The indictment charged that petitioner had overstated deductions for cost of goods sold on his 1973 and 1974 income tax returns. In late 1969 or early 1970, petitioner had begun operating a small graphic arts business. Prior to forming the business, petitioner had been employed for many years by Keuffel and Esser (K & E), a graphics firm. During 1973 and 1974, petitioner became involved in a kickback scheme in the graphics industry. The salient feature of petitioner's participation in the scheme was that his firm would invoice K & E for work not done or overbill it for work performed. K & E would then pay petitioner for the invoiced work. Petitioner, in turn, would have his subcontractors overcharge him for subcontracted work. When petitioner paid the subcontractors by check, they returned to him the cash after deducting an amount sufficient to cover their increased taxes from the additional income. Petitioner then deducted enough to cover his increased taxes due to the scheme, if any, and transferred the cash to Meacham, the general manager of K & E, or Anderson, another party to the scheme.

When petitioner was paid for his invoices, he recognized those amounts as gross income. When he paid his subcontractors, he deducted the payments as costs of goods sold and reported them on 1099 forms as income to the subcontractors. Petitioner did not, however, reflect in any way on his books or tax returns the cash he received back from his subcontractors and passed on to Meacham and Anderson.

The evidence against petitioner included, *inter alia*, certain of his business records, which had been obtained by use of a grand jury subpoena duces tecum. Petitioner

made no objection to the subpoena when it was served on him, and complied with it (Pet. 4, 7). Prior to trial, petitioner moved to suppress the records on the ground, *inter alia*, that their use against him violated his Fourth Amendment rights.

1. Petitioner contends (Pet. 9-14) that the trial court's instruction to the jury on the elements of the offense with which he was charged directed a finding of guilt on the issue of the falsity of the return and thus constitutes reversible error. The trial court instructed the jury as follows (Pet. App. 9a-10a):

> You have heard a good deal of testimony and argument concerning the 1099 form. You are told that even though the 1099 form accurately reflected the actual amount paid to persons such as Rudy or Cummings, or Lam [the subcontractors], the defendant cannot deduct amounts as cost of labor, even though they were included in those 1099 forms in those amounts, and to the extent that those amounts were paid to persons with the understanding that those amounts would be repaid to the defendant, and which were actually repaid to the defendant.
>
> And this is so regardless of what he may have done with the money after it was so repaid to him. And a return which undertakes to deduct such amount—that is, amounts which were returned to him on an understanding that they would be returned to him—a return which undertakes to deduct such amounts is an untrue return.

The question of whether a return is true or untrue under a given set of facts is a question of law on which the trial court is required to instruct the jury. *Lisansky* v. *United States*, 31 F. 2d 846, 851 (4th Cir. 1929), cert. denied, 279 U.S. 873 (1929); cf. *Cooley* v. *United States*, 501 F. 2d 1249, 1253-1254 (9th Cir. 1974). In the present case, the trial court properly instructed the jury on the law—that a return on which deductions are taken for amounts paid out by the taxpayer, but returned to him on an understanding that they would be returned to him, is an untrue return regardless of what the taxpayer may have done with the money after it was repaid to him.[1] This left to the jury the factual issue of how the transactions had been reported on the tax returns and of petitioner's wilfullness. Since the trial court did not instruct the jury how any facts should be determined or withdraw any questions of fact from its consideration, this case presents no conflict with the cases relied on by petitioner.[2]

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[1]The instruction was clearly an accurate statement of the law. Section 7206(1) is violated by even the failure to report income which is offset by *deductible* expenses. *United States* v. *Taylor*, 574 F. 2d 232 (5th Cir.), cert. denied, 439 U.S. 893 (1978); *United States* v. *Williams*, 573 F. 2d 284 (5th Cir. 1978).

Moreover, even if petitioner's kickback expenditures were deductible, he violated Section 7206(1) by intentionally misrepresenting the nature of the deductible expenses. See *United States* v. *DiVarco*, 484 F. 2d 670 (7th Cir. 1973), cert. denied, 415 U.S. 916 (1974).

[2]In *United States* v. *Raub*, 177 F. 2d 312 (7th Cir. 1949), an action for the willful attempt to evade income taxes by the filing of a false and fraudulent return, the trial court had withdrawn from the jury the factual issue of the manner of the reporting itself. Factual issues were also withdrawn from jury consideration in *United States* v. *England*, 347 F. 2d 425 (7th Cir. 1965), *Schwachter* v. *United States*, 237 F. 2d 640 (6th Cir. 1956), *United States* v. *Manuszak*, 234 F. 2d 421 (3d Cir. 1947) and *Konda* v. *United States*, 166 F. 91 (7th Cir. 1908).

Even if, as petitioner contends (Pet. 9-14), *Guy* v. *United States*, 336 F. 2d 595 (4th Cir. 1964), conflicts with the cases on which he relies because the appellate court in *Guy* permitted the withdrawal of a factual issue from the jury, that conflict is not presented by this case, since here no factual issue was withdrawn from the jury.

2. Petitioner also claims that the use at trial of his business records, obtained from him by a grand jury subpoena, violated his Fourth Amendment rights (Pet. 14-17). Petitioner's sole claim is that, according to *Boyd* v. *United States*, 116 U.S. 616 (1886), "private papers in the hands of an individual may not be seized other than by a valid search warrant" (Pet. 17). Obtaining records by a subpoena duces tecum, however, involves neither a search nor a seizure. To the extent that *Boyd* may have suggested otherwise, that suggestion has long since been overruled. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 195, 202-209 (1946); *Wilson* v. *United States*, 221 U.S. 361, 375-376 (1911); *Hale* v. *Henkel*, 201 U.S. 43, 73 (1906).

The only Fourth Amendment constraint upon a subpoena duces tecum is that it not be so indefinite or so broad as to be unreasonable. *Oklahoma Press Publishing Co.*, *supra*, 327 U.S. at 208; *Hale*, *supra*, 201 U.S. at 76-77. Petitioner is not claiming and, in light of its specificity and narrowness, cannot claim that the subpoena at issue was unreasonable. In any event, having failed to challenge the subpoena at the time it was served upon him, petitioner waived any possible objection that the subpoena was unreasonably broad, indefinite, or burdensome.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. McCREE, JR.
Solicitor General

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